STATE OF MICHIGAN

COURT OF APPEALS

KAMLESH CHOPRA,

Plaintiff-Appellant,

v

INVESTSCAPE, INC.,

Defendant-Appellee.

UNPUBLISHED
February 18, 2003

No. 233640
Oakland Circuit Court
LC No. 00-024080-CZ

Before: Bandstra, P.J., and Zahra and Meter, J.J.

PER CURIAM.

Plaintiff appeals as of right the trial court's order confirming the arbitration award, and denying plaintiff's petition to vacate the arbitration award, in favor of defendant brokerage company rendered by a National Association of Security Dealers, Inc. (NASD) arbitration panel. We affirm.

I. Facts and Procedure

Plaintiff alleged that defendant had manipulated the equity balances in her day trading account and improperly liquidated stocks in her account for maintenance margin calls.[1] The NASD panel denied plaintiff's claims against defendant and assessed forum fees of $6,075 against plaintiff. Plaintiff petitioned the circuit court to vacate the arbitration award, alleging that the arbitration panel refused to allow time for the presentation of evidence, exceeded its powers, failed to postpone the hearing, and refused to hear material evidence. Defendant filed a motion for summary disposition. Plaintiff filed another motion to vacate, alleging that the arbitration panel erred in refusing to subpoena two witnesses or allowing her more time to subpoena the witnesses herself. The circuit court granted defendant summary disposition, denied plaintiff's petition to vacate the award, and confirmed the award.

[1] A "margin call" is "[a] demand by a broker to put up money or securities upon purchase of a stock, or, if the stock is already owned on margin, to increase the money or securities in the event the price of the stock has or is likely to fall since purchase." Black's Law Dictionary (6th ed).

II. Analysis

Judicial review of arbitration awards is very limited.[2] A court may not review an arbitrator's factual findings or decisions on the merits. *Byron Center Pub Schools Bd of Ed v Kent Co Ed Ass'n*, 186 Mich App 29, 31; 463 NW2d 112 (1990). A court may set aside an arbitration award only if it clearly appears on the face of the award or in the reasons for the decision that the arbitrator made an error of law and that, but for that error, a substantially different award must be made. *DAIIE v Gavin*, 416 Mich 407, 428-429; 331 NW2d 418 (1982); *Dohanyos v Detrex Corp (After Remand)*, 217 Mich App 171, 176; 550 NW2d 608 (1996). The only circumstances in which a court can vacate an award are provided in MCR 3.602(J)(1):[3]

> On application of a party, the court shall vacate an award if:
>
> (a) the award was procured by corruption, fraud, or other undue means;
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> (b) there was evident partiality by an arbitrator appointed as a neutral, corruption of an arbitrator, or misconduct prejudicing a party's rights;
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> (c) the arbitrator exceeded his or her powers; or
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> (d) the arbitrator refused to postpone the hearing on a showing of sufficient cause, refused to hear evidence material to the controversy, or otherwise conducted the hearing to prejudice substantially a party's rights.

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[2] NASD arbitrations are governed by the Federal Arbitration Act (FAA), 9 USC §§ 1 *et seq.*, because they involve interstate commerce. However, the circuit court and parties analyzed the issues raised herein under Michigan Court Rule 3.602(J). Since the criteria for vacating or modifying an arbitration award under the FAA and MCR 3.602(J) are substantially similar, this Court will analyze the issues using Michigan case law, noting any differences where applicable.

[3] The FAA equivalent of MCR 3.602(J)(1) is 9 USC 10, which states, in relevant part:

> (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
>
> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

> The fact that the relief could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

Plaintiff first alleges that the arbitration panel chairperson was biased. The party who attacks the impartiality of an arbitrator carries the burden of proof. *Emmons v Lake States Ins Co*, 193 Mich App 460, 466; 484 NW2d 712 (1992). We review de novo claims of arbitrator bias. See *Belen v Allstate Ins Co*, 173 Mich App 641, 645; 434 NW2d 203 (1988).

This Court, in *Belen*, *supra* at 645, articulated the standard for overturning an arbitration award based on arbitrator bias:

> Partiality or bias, which will allow a court to overturn an arbitration award, must be certain and direct, not remote, uncertain or speculative. *Kauffman v Haas*, 113 Mich App 816, 819; 318 NW2d 572 (1982). MCR 3.602(J)(1)(b), by its own terms, indicates a degree of partiality that is readily observable. Moreover, the court rule does not require that the arbitrators give equal credence to all testimony. Indeed, the arbitrators must remain free to reject any testimony or arguments that they find unpersuasive. . . . Absent certain and direct evidence of partiality, we cannot conclude that there was a showing sufficient to vacate the arbitration award.

In addition, arbitrators must disclose to the parties any dealings that might create an impression of possible bias; however, the impression must be a reasonable one. *North American Steel Corp v Siderius, Inc*, 75 Mich App 391, 404; 254 NW2d 899 (1977). "It is not any undisclosed relationship, no matter how peripheral, superficial or insignificant, that compels vacation on the grounds of partiality or prejudice." *Id.*

Plaintiff has not produced any evidence of obvious partiality or bias by the arbitration chairperson. Plaintiff merely speculates that the chairperson was biased because he ruled in favor of defendant and against her. Moreover, plaintiff claims that the chairperson and defense counsel may have had undisclosed previous professional dealings in the past. However, the fact that the chairperson ruled in favor of defendant or that defense counsel may have had dealings with the chairperson in the past is not a sufficient basis for vacating the arbitration award absent some evidence of actual bias. MCR 3.602(J)(1)(b).

Plaintiff next argues, and defendant does not dispute, that the arbitration panel erred in stating that they did not have the power to subpoena a witness who was not in the securities industry.[4] Upon reviewing the evidence, the trial court correctly recognized this as an error by

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[4] NASD Rule 10-322(a) states:

> The arbitrators and any counsel of record to the proceeding have the power of the subpoena process as provided by law. . . .

MCR 3.602(F)(1) states:

> MCR 2.506 [which covers the procedures for issuing subpoenas] applies to arbitration hearings.

(continued…)

the arbitration panel, and correctly concluded that this error was harmless because the arbitrators were not required to hear the testimony of witnesses that were not listed on plaintiff's witness list. Therefore, the error did not require that the arbitration award be vacated.

Plaintiff also contends that the panel's refusal to allow her time to obtain subpoenas for two witnesses herself substantially prejudiced her right to a fair hearing. MCR 3.602(J)(1)(d). Specifically, plaintiff argues that the two witnesses were material witnesses necessary for her to prove defendant's culpability in mismanaging her account and wrongfully liquidating holdings out of her account. However, plaintiff's claim that the two witnesses were imperative in proving defendant's culpability is without merit. Although plaintiff now claims that these witnesses were integral to proving her case, she failed to identify either witness on her witness list nor did she voluntarily contact these witnesses and ask them to participate in the proceedings. Thus, plaintiff can hardly claim that the two omitted witnesses were crucial in proving defendant's culpability.

Moreover, from the face of the award, the arbitration panel did not appear to believe that there were any accounting irregularities present for which culpability had to be proven. *Gavin, supra* at 428-429; *Dohanyos, supra* at 176. At the arbitration hearing, plaintiff presented and explained her accountant's statements, which allegedly showed a different balance than the statements generated by defendant. Plaintiff questioned defendant's office manager about the alleged discrepancies in the statements. The panel was presented with both sets of statements for study and also spoke by telephone to plaintiff's accountant. After reviewing all this evidence, the panel dismissed plaintiff's claim. Therefore, it appears from the face of the award that the panel did not find any discrepancy in the account statements. Hence, the testimony of the two witnesses was not necessary to prove who was responsible for the accounting irregularities since the panel did not find any accounting irregularities. Therefore, we conclude that plaintiff was not denied a fair hearing by the panel's refusal to allow her time to subpoena the two witnesses. MCR 3.602(J)(1)(d).

Plaintiff further contends that defense counsel's misconduct during the arbitration hearing and the motion hearing before the circuit court prejudiced her rights. MCR 3.602(J)(1)(b). Specifically, plaintiff alleges that defendant deliberately misled plaintiff into believing that she was not required to provide on her witness list those witnesses that defendant already listed on his own list. Even if defense counsel acted improperly during the proceedings below, we conclude that counsel's alleged misconduct did not prejudice plaintiff's rights or affect the validity of the arbitration award. This Court recently discussed the effect of attorney misconduct in an arbitration setting in *Bell v Seabury*, 243 Mich App 413; 622 NW2d 347 (2000). In *Bell*, the circuit court vacated an NASD arbitration award because of the defense counsel's unethical behavior. *Bell, supra* at 415. This Court reversed the vacation of the award "because the alleged

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9 USC 7 states, in relevant part:

> The arbitrators selected either as prescribed in this title [9 USC §§ 1 et seq.] or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. . . .

misconduct had no effect on the arbitral award." *Id.* Likewise, in this case, plaintiff has not demonstrated that the award was procured by corruption, fraud, or undue means, or misconduct prejudicing a party's rights, and counsel's alleged misconduct during the arbitration hearings and the motion hearing did not affect the validity of the arbitration award. MCR 3.602(J)(1)(a) and (b).

Plaintiff next argues that the arbitration panel refused to consider her accountant's documentation and testimony. MCR 3.602(J)(1)(d). Plaintiff did not raise this issue below and did not provide any record cites to sustain this argument. This Court need not review issues raised for the first time on appeal. *Herald Co v City of Kalamazoo*, 229 Mich App 376, 390; 581 NW2d 295 (1998). Further, a party may not leave it to this Court to search for the factual basis to sustain or reject his position. *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001). Even if the issue had been properly preserved, plaintiff has failed to demonstrate that the arbitration panel improperly excluded evidence material to the controversy. It appears from the record that the panel heard the testimony of plaintiff's accountant telephonically and admitted the entire documentation plaintiff offered as evidence. Plaintiff's argument goes not to the admissibility of plaintiff's evidence, but to the weight given the evidence by the panel. Arbitrators are not required to give equal credence to all testimony, but rather "remain free to reject any testimony or arguments that they find unpersuasive." *Belen*, *supra* at 645. The degree of consideration given evidence is not a matter for appellate review. *Id.* at 646.

Plaintiff next argues that the panel improperly considered irrelevant documentation damaging to plaintiff before the hearing. We disagree. Again, plaintiff does not support her allegation that the panel considered irrelevant documents before the hearing with record cites or any other evidence. Plaintiff attached her personal affidavit to one of her motions in the circuit court alleging that she had personal knowledge that documentation had been sent to the panel by defendant before the hearing. However, plaintiff does not reveal the contents of the documents or discuss how those contents would be damaging to her case. Therefore, plaintiff has not demonstrated that the arbitration panel improperly considered irrelevant documents submitted by defendant before the hearings, and plaintiff has not demonstrated that the award was procured by corruption, fraud, or undue means. MCR 3.602(J)(1)(a).

Plaintiff next contends that defendant's office manager was untruthful at the hearing when he said he did not know from where the figures in plaintiff's account were derived and that the award was, therefore, procured by corruption, fraud, or undue means. MCR 3.602(J)(1)(a). We disagree. Allegations that a single witness testified untruthfully will not support a claim that an arbitration award was procured by corruption, fraud or undue means. The veracity of a witness should be challenged on cross-examination. It is for the arbitrators to determine the credibility of witnesses and enter an award accordingly.

Finally, plaintiff argues in general terms that the circuit court erred in confirming the arbitration award. We disagree. Plaintiff has failed to prove any of her claims of arbitrator bias or party misconduct warranting vacation of the award. MCR 3.602(J)(1)(a) and (b). Furthermore, the degree of consideration given evidence by an arbitration panel is not a matter for appellate review, and plaintiff has not demonstrated that the panel refused to consider evidence material to the controversy. MCR 3.602(J)(1)(d); *Belen*, *supra* at 646. Accordingly, the trial court did not err in granting defendant's motion for summary disposition and in confirming the award.

III. Conclusion

In sum, no finding of arbitrator bias existed; therefore the award cannot be vacated on this basis. Although the trial court correctly recognized that the arbitration panel erred in stating that they did not have the power to subpoena a witness, this error did not require that the arbitration award be vacated because these witnesses were immaterial and plaintiff was not denied a fair hearing by the panel. Defense counsel's alleged misconduct did not affect the validity of the arbitration award. Plaintiff's argument that the arbitration panel refused to consider her accountant's documentation and testimony was waived on appeal. Plaintiff has not demonstrated that the arbitration panel improperly considered irrelevant documents submitted by defendant before the hearings. Plaintiff's contention that the arbitral award was procured by corruption, fraud, or undue means due to the fact that the office manager lied at the hearing is a credibility determination to be made by the arbitrators. The trial court did not err in granting defendant's motion for summary disposition and in confirming the award.

Affirmed.

/s/ Richard A. Bandstra
/s/ Brian K. Zahra
/s/ Patrick M. Meter